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Supreme Court of the United States

October Term, 1946.

No. 890....

Smith, Richey & Co., Inc., Eugene Walter, Central Beef Co., A. J. Olpp, Inc., A. Woursell, Berliner & Marx, Golden Packing Co., Inc., Bronx Meat Co., Edmund Mayer, Inc., Gustave Buxbaum, B. Futterman & Co., Geier & Geier, Inc., Chas. A. Beekman, H. Eppsteiner & Son, Inc., Henry Frohlich, Inc., Hanson Pkg. Corp., Intercity Prov. Corp., Interboro Packing Co., Inc., Greenpoint Beef Co., Inc., Leo Kalberman Co., George Korn & Sons, Manhattan Lamb & Veal Co.. Nevins Packing Co., Inc., Philip B. Newmark, Inc., Pyramid Packing Co., Inc., Royal Packing Co., Inc., Scanlan, Goldstein & Co., Inc., Julius Tantleff, Jamaica Wholesale Meat Co., Inc., Standard Beef Co. of L. I., Inc., Staten Island Packing Co., Charles Trautmann Company, H. Zabriskie, Eastern Meat Markets, Inc., American Products Co., D. Fullerton & Company, Inc., Greenwood Packing Co., Clem Lockerty, Gustave Sobo and Charles Freeman, on behalf of themselves and others similarly situated,

Petitioners,

AGAINST

Philip B. Fleming, Temporary Controls Administrator,
Respondent.

Petition for a Writ of Certiorari to the United States Emergency Court of Appeals and Brief in Support of the Petition.

JOSEPH COHN,
Attorney for Petitioners.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

Smith, Richey & Co., Inc., Eugene Walter, Central Beef Co., A. J. Olpp, Inc., A. Woursell, Berliner & Marx, Golden Packing Co., Inc., Bronx Meat Co., Edmund Mayer, Inc., Gustave Buxbaum, B. Futterman & Co., Geier & Geier, Inc., Chas. A. Beekman, H. Eppsteiner & Son, Inc., Henry Frohlich, Inc., Hanson Pkg. Corp., Intercity Prov. Corp., Interboro Packing Co., Inc., Greenpoint Beef Co., Inc., Leo Kalberman Co., George Korn & Sons, Manhattan Lamb & Veal Co., Nevins Packing Co., Inc., Philip B. Newmark, Inc., Pyramid Packing Co., Inc., Royal Packing Co., Inc., Scanlan, Goldstein & Co., Inc., Julius Tantleff, Jamaica Wholesale Meat Co., Inc., Standard Beef Co. of L. I., Inc., Staten Island Packing Co., Charles Trautmann Company, H. Zabriskie, Eastern Meat Markets, Inc., American Products Co., D. Fullerton & Company, Inc., Greenwood Packing Co., Clem Lockerty, Gustave Sobo and Charles Freeman, on behalf of themselves and others similarly situated,

Petitioners,

AGAINST

Philip B. Fleming, Temporary Controls Administrator,

Respondent.

Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

The above named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the

United States Emergency Court of Appeals dismissing the complaint filed by petitioners in said court under Section 204 (a) of the Emergency Price Control Act, as amended (56 Stat. 23; 50 U. S. C. App. Sec. 924 [a]), with leave to petitioners to move to reinstate the complaint in the event that any proceeding should be brought against petitioners under Section 205 of said Act (56 Stat. 23, 34; 50 U. S. C. App. Sec. 925), based upon any provision of the orders and regulations objected to in the complaint, and retaining jurisdiction of the cause for such purpose, but failing to grant like leave and to retain jurisdiction for such purpose in the event of future criminal proceedings against petitioners under Section 37 of the United States Criminal Code (18 U. S. C. A. Sec. 88), or state or local price control enforcement laws.

Statutes, Regulations and Orders Involved.

The pertinent provisions of the Emergency Price Control Act of 1942 (Public Law 421, 77th Cong., 2nd Sess., 56 Stat. 23; 50 U. S. C. App., Secs. 901-946), as amended by the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2nd Sess., 58 Stat. 632), the Act of June 30, 1945 (Public Law 108, 79th Cong., 1st Sess.), and the Price Control Extension Act of 1946 (Public Law 548, 79th Cong., 2nd Sess.), hereinafter referred to as the Act; Section 392 of the General Business Law of the State of New York (New York Laws of 1946, Ch. 405); Section U 41-5.0 of the Administrative Code of the City of New York (N. Y. C. Local Laws for 1945, No. 35); and Supplementary Order 40 issued by the Price Administrator, as amended (11 F. R. 14,103), appear in the Appendix, *infra*, 18-24.

The maximum price regulations involved, are as stated in the first paragraph under the next heading.

Statement of the Matter Involved.

On January 18, 23, and 27, 1945, respectively, petitioners, who are meat wholesalers located in the New York City area, filed protests against Revised Maximum Price Regulation 169—Beef and Veal Carcasses and Wholesale Cuts (7 F. R. 10,381); Revised Maximum Price Regulation 239—Lamb and Mutton Carcasses and Wholesale Cuts (7 F. R. 10,688); and Revised Maximum Price Regulation 148—Dressed Hogs and Wholesale Pork Cuts (7 F. R. 8609). The protests requested consideration by a Board of Review (R. 23-24).

The objections asserted in the protests were that the said regulations, as originally issued and as amended, *in toto,* were invalid as to wholesalers and the protests sought a determination of the question of validity of the said regulations, prospectively as well as retrospectively (R. 24, 267).

On February 19, 1945, the Price Administrator, hereinafter referred to as the Administrator, ordered said protests to be consolidated and provided petitioners with an opportunity to present certain specified evidence, which petitioners filed (R. 24). On September 18, 1946, the Administrator ordered the evidential record closed and referred the proceeding to a Board of Review for a hearing, which hearing was held on October 14, 1946 (R. 25).

On October 15, 1946, the Administrator issued Amendment 64 to Supplementary Order 132 (11 F. R. 12,093), exempting livestock and meat from price control, and on the same day, without waiting for recommendations by the Board of Review, the Administrator ordered the protests to be dismissed on the alleged ground that "the protests requested prospective relief only, and, since these regulations are no longer in effect, the proceeding has become moot" (R. 25).

On November 13, 1946, pursuant to the provisions of Section 204 (a) of the Act, petitioners duly filed their

complaint in the United States Emergency Court of Appeals requesting that the protested regulations be set aside as to petitioners (R. 1-18), and, on the 26th day of November, 1946, the Administrator moved to dismiss the said complaint on the alleged ground "that the proceeding is moot" (R. 18-21).

On December 17, 1946, the United States Emergency Court of Appeals rendered judgment as stated above, without opinion (R. 39).

Basis of Jurisdiction.

The judgment of the United States Emergency Court of Appeals sought to be reviewed was entered on December 17, 1946 (R. 39). Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 50 U. S. C. App., Sec. 924 [d]), providing that judgments of the United States Emergency Court of Appeals shall be subject to review by this Court on writ of certiorari in the same manner as a judgment of a circuit court of appeals as provided in Section 240 of the Judicial Code, as amended (U. S. C., 1934 Ed., Title 28, Sec. 347).

Questions Presented.

The questions presented are:

1. Whether having followed the procedure prescribed by Section 203 (a) of the Act (56 Stat. 23, 31, 58 Stat. 632, 638; 50 U. S. C. App. 923 [a]), petitioners had a right to a determination of the validity of the protested regulations, prospectively as well as retrospectively?

2. Whether petitioners' right to a determination of the retrospective validity of the protested regulations was lost by the mere fact that meat was exempt from price control and that the question of prospective validity has become moot?

3. Whether the order of the Administrator dismissing the protests, without waiting for recommendations by the Board of Review, was authorized by Section 203 (c) of the Act (58 Stat. 632; 50 U. S. C. App. Sec. 923 [c]), which requires consideration of such recommendations?

4. Whether, having followed the procedure prescribed by Section 204 (a) of the Act, petitioners have a right to have the dismissal of their protests reviewed by the Emergency Court of Appeals?

5. Whether petitioners' right under Sections 203 (a) and 204 (a) of the Act to a determination of their protests and judicial review of the dismissal thereof, if not lost as stated in Question "2" above, has been suspended by the exemption of meat from price control until such time as enforcement proceedings would be instituted against petitioners?

6. Whether, being still subject to the protested regulations and to enforcement proceedings based on violation thereof which may be charged to have been committed by petitioners before the exemption of meat from price control, petitioners may be deprived of their right to test the validity of the protested regulations by proceedings pursuant to Sections 203 (a) and 204 (a) of the Act merely because no enforcement proceedings are currently pending against them?

7. Whether the necessity of preserving petitioners' right to test the validity of the protested regulations in accordance with the demands of due process in the event of future enforcement proceedings against petitioners, which the Emergency Court of Appeals purports to have preserved by its leave to petitioners to move to reinstate the complaint in the event of future enforcement proceedings against petitioners under Section 205 of the Act and

its retainer of jurisdiction for such purpose, does not exist in equal or even larger measure with respect to future criminal proceedings against petitioners under the Criminal Code or state or local price control enforcement laws?

8. Whether the judgment of the Emergency Court of Appeals, dismissing the complaint and failing to grant petitioners leave to move to reinstate the complaint in the event of future criminal proceedings against petitioners under the Criminal Code or state or local price control enforcement laws, does not deprive petitioners of the due process of law guaranteed to them by the Fifth Amendment to the Constitution of the United States and preserved for them by Sections 203 (a) and 204 (a) of the Act?

Reasons Relied on for the Allowance of the Writ.

The reasons relied on for the allowance of the writ are:

1. That Sections 203 (a) and 204 (a) of the Act authorized "any person subject to any provision" of a price regulation issued by the Administrator to "file a protest specifically setting forth objections to any such provisions" and gave to every such person who filed a protest a right to have such protest considered on the merits by the Administrator, and, in case of denial or dismissal, to resort to the Emergency Court of Appeals (Brief, *infra*, 11).

2. That, notwithstanding the exemption of meat from price control, petitioners are still "subject to" the protested regulations and to enforcement proceedings based on violations thereof which may be charged to have been committed by them during the time that meat was subject to price control (Brief, *infra*, 11).

3. That, with respect to any such alleged violation, petitioners are subject not only to enforcement proceedings under Section 205 of the Act, but also to criminal proceedings under Section 37 of the Criminal Code, dealing with conspiracy to commit an offense against the United States, and to criminal proceedings under Section 392 of the General Business Law of the State of New York and Section U 41-5.0 of the Administrative Code of the City of New York, which prohibit violation of any price regulation and make such violation punishable by fine and imprisonment (Brief, *infra*, 14).

4. That Section 204 (d) of the Act deprives the War Emergency Court of the City Magistrate's Court of the City of New York, having jurisdiction over criminal proceedings pursuant to said state or local laws, of jurisdiction to consider the validity of any price regulation and that the ancillary method of testing the validity of price regulations provided by Section 204 (e) (1) of the Act (58 Stat. 632, 639; 50 U. S. C. App. Sec. 924 [e] [1]), in connection with enforcement proceedings under Section 205 of the Act or Section 37 of the Criminal Code, is not available to defendants in criminal proceedings under state or local price control enforcement laws (Brief, *infra*, 12, 14).

5. That the method of testing the validity of price regulations provided by Sections 203 (a) and 204 (a) of the Act, which was employed by petitioners, is the only method provided by the Act to meet the demands of due process in the event of criminal proceedings against petitioners under said New York State or City Laws (Brief, *infra*, 14-15).

6. That the judgment of the Emergency Court of Appeals, dismissing the complaint and failing to grant to petitioners leave to move to reinstate the complaint in

the event of future proceedings against petitioners under the Criminal Code or state or local price control enforcement laws and to retain jurisdiction of the cause for such purpose, deprives petitioners of their right to test the validity of the protested regulations in accordance with the due process guaranteed to them by the Fifth Amendment to the Constitution and preserved for them by Sections 203 (a) and 204 (a) of the Act (Brief, *infra*, 15-16).

7. That the judgment of the Emergency Court of Appeals implies and unmistakeably appears to be based on a construction of Sections 203 (a) and 204 (a) of the Act which is in conflict with the clear language of said sections, the Congressional intent in enacting same, and the construction of the Act and the principles declared by this Court in *Yakus* v. *U. S.*, 321 U. S. 414 (Brief, *infra*, 12).

8. That the judgment of the Emergency Court of Appeals, involving as it does important constitutional rights of petitioners and many other persons similarly situated, involves an important question of Federal law which has not been, but should be, settled by this Court.

WHEREFORE, petitioners pray that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH COHN,
Attorney for Petitioners.

Brief in Support of Petition for a Writ of Certiorari.

Statutes, Regulations and Orders Involved.

The pertinent provisions of the Act, the New York State and City price control enforcement laws and Supplementary Order 40 issued by the Administrator, appear in the Appendix, *infra*, 18-25. The price regulations and decontrol order involved are cited in the petition under the heading "Statement of the Matter Involved".

Opinion Below.

No opinion was rendered by the Emergency Court of Appeals.

Grounds of Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the petition under the heading "Basis of Jurisdiction".

Statement of the Case.

A statement of the case appears in the petition under the heading "Statement of the Matter Involved".

Specification of Errors.

The United States Emergency Court of Appeals erred:

1. In failing to hold that petitioners had an unqualified right to a determination of the retrospective validity of the protested regulations and to a review by said court of the dismissal of their protests.

2. In failing to hold that the order of the Administrator dismissing the protests, without waiting for recom-

mendations by the Board of Review, was unauthorized and in violation of the provisions of Section 203 (c) of the Act.

3. In dismissing the complaint.

4. In limiting its leave to petitioners to move to reinstate the complaint in the event of future enforcement proceedings against petitioners and its retainer of jurisdiction of the cause for such purpose to future enforcement proceedings under Section 205 of the Act, and failing to grant petitioners like leave and to retain jurisdiction for such purpose in the event of future criminal proceedings under the Criminal Code or state or local price control enforcement laws.

Summary of Argument.

1. Sections 203 (a) and 204 (a) of the Act granted petitioners an unqualified right to a determination of their protests and judicial review of the dismissal thereof.

2. The right of protest, determination and review granted to persons "subject to" price regulations by Sections 203 (a) and 204 (a) of the Act is not conditioned upon an actual pendency or "threat" of enforcement proceedings.

3. The method of testing the validity of price regulations granted by Sections 203 (a) and 204 (a) of the Act and followed by petitioners is the only method provided by the Act to meet the demands of due process in the event of criminal proceedings under state or local price control enforcement laws.

4. The judgment of the Emergency Court of Appeals exposes petitioners to conviction in criminal proceedings under state and local price control enforcement laws without due process of law.

ARGUMENT.

I.

Sections 203 (a) and 204 (a) of the Act granted petitioners an unqualified right to a determination of their protests and judicial review of the dismissal thereof.

The protests, under Section 203 (a) of the Act, sought a determination of the question of validity of the protested regulations, prospectively as well as retrospectively (R26-28). The question of prospective validity became moot when meat was exempt from price control. The same, however, is not true of the question of retrospective validity, as petitioners are still "subject to" the protested regulations and to enforcement proceedings based on violations thereof which may be charged to have been committed by them before the exemption of meat from price control. *U. S.* v. *Hark,* 320 U. S. 531; *Supplementary Order 40 issued by the Price Administrator, as amended,* 11 F. R. 14,103.

It follows that petitioners' right to a determination of the retrospective validity of the protested regulations was not lost by the mere fact that the question of prospective validity has become moot, that petitioners have an unqualified right to such determination and that, having filed a complaint under Section 204 (a) of the Act, petitioners have an unqualified right under said section to have the dismissal of their protests reviewed by the Emergency Court of Appeals. *Collins et al.* v. *Porter,*—U. S.—; 90 L. Ed. 799; *Utah Junk Co.* v. *Porter,*—U. S.—; 90 L. Ed. 796; *Thomas Paper Stock Co. et al.* v. *Porter,*—U. S.—; 90 L. Ed. 790.

II.

The right of protest, determination and review granted to persons "subject to" price regulations by Sections 203 (a) and 204 (a) of the Act is not conditioned upon an actual pendency or "threat" of enforcement proceedings.

The right of protest, determination and review provided by Sections 203 (a) and 204 (a) of the Act is unqualified and not conditioned upon an actual pendency (*cf. Collins et al.* v. *Porter, supra*) or "threat" (*cf. Utah Junk Co.* v. *Porter, supra*) of enforcement proceedings. The unqualified nature of said right is apparent from the language of said sections, which is free from ambiguity, and from the fact that it was provided to meet the demands of due process of law and in order to afford persons subject to any price regulation an opportunity of testing the validity thereof by an independent administrative proceeding in advance of the existence of any such circumstances and, by thus preserving their right of due process, to preclude the defense of invalidity of such regulation in the event of subsequent enforcement proceedings based upon any violation thereof.

It was only because of this broad construction of the statute, which afforded to every person subject to a price regulation an opportunity to preserve his right of due process, that this Court found it possible to and did sustain the provision of Section 204 (d) of the Act (50 U. S. C. App. Sec. 924 [d]), which vested exclusive jurisdiction to determine the validity of a price regulation in the Emergency Court of Appeals and in this Court and withdrew such jurisdiction from all other courts. *Yakus* v. *U. S.*, 321 U. S. 414.

The Congressional intent to afford such right to any person subject to a regulation, without any qualifications of the kind stated above, appears even more clearly from

the fact that prior to the amendment of the Act by the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2nd Sess.; 58 Stat. 632) the attack upon the validity of a regulation in the manner prescribed by said sections was required to be initiated within sixty days from the effective date of the regulation, irrespective of the lack of charge or occurrence of a violation during said period; that no other method of testing the validity of a regulation was provided; and that the right of any person, who failed to test the validity of a regulation within the prescribed period, was forever lost. *Yakus* v. *U. S., supra.*

The unqualified nature of this right was not in any way repealed or qualified by said 1944 amendment of the Act, which authorized the filing of a protest "at any time after the issuance of any regulation" and added to the Act Section 204 (e) (1) thereof (58 Stat. 632, 639; 50 U. S. C. App. Sec. 924 [e] [1]), providing an additional cumulative method of testing the validity of a regulation in certain cases. *Utah Junk Co.* v. *Porter, supra; Collins et al.* v. *Porter, supra; Thomas Paper Stock Co. et al.* v. *Porter, supra.*

The above makes it clear that, in enacting Sections 203 (a) and 204 (a) of the Act, it was the intention of Congress to preserve the right of due process to all persons subject to a price regulation and to enforcement proceedings based on any violation thereof and to afford to such persons the unqualified right of securing a determination of the retrospective validity of a regulation even though no enforcement proceeding is currently pending and no facts constituting a violation are currently known to exist, and also that such right acquired by the institution of a proceeding in the manner prescribed by said sections should continue as long as it may be necessary for any person who instituted such proceeding to preserve his right to test the validity of the regulation alleged to be invalid.

The necessity of preserving their right to test the validity of the protested regulations, in accordance with the demands of due process, clearly exists in the case of petitioners, notwithstanding the exemption of meat from price control and the absence of any current or "threatened" enforcement litigation, as petitioners are still subject to enforcement proceedings based on violations which may be charged to have been committed by them before the exemption of meat from price control, *U. S.* v. *Hark, supra; Supplementary Order 40, as amended, supra,* including criminal proceedings under state or local price control enforcement laws, with respect to which the procedure followed by petitioners is the only available method of testing the validity of price regulations (Point III, *infra*).

III.

The method of testing the validity of price regulations granted by Sections 203 (a) and 204 (a) of the Act and followed by petitioners is the only method provided by the Act to meet the demands of due process in the event of criminal proceedings under state or local price control enforcement laws.

Section 204 (e) (1) of the Act, which provides an ancillary method of testing the validity of a price regulation in connection with any enforcement "proceeding brought pursuant to Section 205 of this Act or Section 37 of the Criminal Code * * * involving alleged violation of any * * * regulation" does not apply to criminal proceedings for such alleged violation brought pursuant to state or local price control enforcement laws. *In Re Nevins Packing Co., Inc., et al.* (E. D. N. Y., Oct. 22, 1946, Misc. 1100, 5 OPA Opinions and Decisions 2062).

With respect to any violation of the protested regulations which may be charged to have been committed by

petitioners before the exemption of meat from price control, petitioners are subject not only to enforcement proceedings under Section 205 of the Act and Section 37 of the Criminal Code, in connection with which an ancillary method of testing the validity of the protested regulations has been provided by Section 204 (e) (1) of the Act, but also to criminal proceedings under Section 392 of the General Business Law of the State of New York and Section U 41-5.0 of the Administrative Code of the City of New York, which make violation of a price regulation punishable by fine and imprisonment and in which proceedings the ancillary method provided by Section 204 (e) (1) of the Act is not available. (R.30)

As the War Emergency Court of the City Magistrate's Court of the City of New York, having jurisdiction of criminal proceedings under said state or local laws, has been deprived by Section 204 (d) of the Act of jurisdiction to consider the validity of any price regulation, and the ancillary method of testing the validity of a regulation provided by Section 204 (e) (1) of the Act will not be available to petitioners in criminal proceedings in said state court under said state or local laws, it follows that the method of testing the validity of the protested regulations provided by Sections 203 (a) and 204 (a) of the Act and followed by petitioners is the only method provided by the Act to meet the demands of due process in the event of criminal proceedings against petitioners under said state or local laws.

IV.

The judgment of the Emergency Court of Appeals exposes petitioners to conviction in criminal proceedings under state and local price control enforcement laws without due process of law.

The Emergency Court of Appeals dismissed the complaint, with leave to petitioners to move to reinstate the complaint in the event of future enforcement proceedings against petitioners under Section 205 of the Act and retained jurisdiction of the cause for such purpose, but failed to grant like leave to petitioners and to retain jurisdiction for such purpose in the event of future criminal proceedings against them under the Criminal Code or state or local price control enforcement laws. (R. 39)

The said judgment, while obviating the necessity of petitioners' invoking the jurisdiction of the Emergency Court of Appeals *de novo* in the event of enforcement proceedings against them under Section 205 of the Act and still leaving to petitioners a limited statutory right to test the validity of the protested regulations in the event of criminal proceedings against them under the Criminal Code, forever bars petitioners from their right to test the validity of the protested regulations in accordance with the demands of due process in the event of criminal proceedings against them under Section 392 of the General Business Law of the State of New York or Section U 41-5.0 of the Administrative Code of the City of New York and exposes petitioners to conviction in such proceedings without due process of law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Emergency Court of Appeals should be granted.

Respectfully submitted,

JOSEPH COHN,
Attorney for Petitioners.

APPENDIX.

Pertinent provisions of Emergency Price Control Act of 1942 (Public Law 421, 77th Cong., 2nd Sess., 56 Stat. 23, 50 U. S. C. App. Secs. 901-946), as amended by the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2nd Sess., 58 Stat. 632), the Act of June 30, 1945 (Public Law 108, 79th Cong., 1st Sess.), and the Price Control Extension Act of 1946 (Public Law 548, 79th Cong., 2nd Sess.); Sec. 392 of The General Business Law of the State of New York (New York Laws of 1946, Ch. 405); Sec. U 41-5.0 of The Administrative Code of the City of New York (New York City Local Laws for 1945, No. 35); Supplementary Order No. 40 issued by the Administrator, as amended (11 F. R. 14,103), are as follows:

Pertinent Provisions of Emergency Price Control Act of 1942, as Amended.

"*Sec. 203* (*a*)—At any time after the issuance of any regulation or order under Section 2, or in the case of a price schedule, at any time after the effective date thereof specified in Section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this sub-

section, but in no event more than thirty days after such filing the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

(*c*)—Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpoenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to

present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.

* * * * *

Sec. 204 (*a*)—Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding * * *.

(*d*)—Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court

in the same manner as a judgment of a circuit court of appeals as provided in Section 240 of the Judicial Code, as amended (U. S. C. 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2, of any price schedule effective in accordance with the provisions of Section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(*e*) (*1*)—Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to Section 205 of this Act or Section 37 of the Criminal Code involving alleged violation of any provision of any regulation or order issued under Section 2 or of any price schedule effective in accordance with the provisions of Section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a

complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with Section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c) and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection."

SEC. 392 OF THE GENERAL BUSINESS LAW OF THE STATE OF NEW YORK, AS AMENDED.

"*Sec. 392—Violation of Regulations and Orders of Federal Price Administrator.* 1. Any person who shall violate any regulation or order established by the price administrator pursuant to the emergency price control act of nineteen hundred forty-two, as amended, or the second war powers act, as amended, shall be punishable by a fine of not more than twenty-five dollars or five days in jail or both * * *.

For the purpose of conferring jurisdiction upon courts and judicial officers generally such violations shall be deemed misdemeanors and for such purpose only all provisions of law relating to misdemeanors shall apply to such violations, provided, however, that courts of special sessions outside the City of New York and city magistrates' courts in the City of New York, in the first instance, shall have exclusive jurisdiction to hear and determine charges of such violations * * *.

Nothing contained in this section shall be construed to supersede or repeal the provisions of any local law on the same or a similar subject.

2. The provisions of this section shall remain in force and effect only until July first, nineteen hundred forty-seven."

SEC. U 41-5.0 OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK.

"*Sec. U 41-5.0* (*a*)—It shall be unlawful for any person to sell, offer for sale, supply or deliver any commodity or service, or in the course of trade or business buy or receive any commodity or service, for which a maximum price has been or may hereafter be prescribed by any regulation, order or price schedule or any amendment thereof, issued by the office of price administration of the United States of America at a price or other consideration in excess of the applicable maximum price prescribed by the applicable regulation, order or price schedule, or offer, solicit, attempt or agree to do any of the foregoing.

* * * * *

(*d*)—*Penalty.* Any person who, by himself or by another, shall violate any of the provisions of this

local law, shall be subject to fine not exceeding the sum of $500, or to imprisonment for a term not to exceed 90 days, or both, for each such violation.

* * * * *

(*f*)—The provisions of this local law with respect to violations of price regulations, price schedules and orders and rationing orders shall remain in force and effect as long as the acts of the congress of the United States, under the authority of which such price regulations, price schedules and orders and rationing orders are issued, shall remain in force and effect.

* * * * *

(*h*)—This section shall apply to wholesalers, jobbers, manufacturers, distributors and middlemen only."

SUPPLEMENTARY ORDER NO. 40, AS AMENDED.

"*Sec. 1305.54—Effect of repeal, revocation, amendment or other modification of price regulations, and exemption or suspension from price control of commodities.* (*a*)—The repeal, revocation, amendment or other modification of a price regulation or any part thereof or the exemption or suspension from price control of any commodity shall not be deemed to release or extinguish any right, penalty, obligation or liability incurred under the applicable price regulation prior to its repeal, revocation, amendment or modification or prior to the time the commodity was exempted or suspended from price control but such regulation or part thereof shall be treated as remaining in force for the purpose of allowing or sustaining any proper suit, action, prosecution or proceeding with respect to such right, penalty, obligation or liability.

(*b*)—Despite the repeal, revocation, amendment or other modification of any price regulation or of any part thereof, or the exemption or suspension from price control of any commodity, every such price regulation and any price regulation applying to such commodity, shall be deemed to remain in full force and effect so far as may be necessary to enable the Price Administrator or any person whom he may designate to exercise the right to issue any amendment, modification, order or interpretation with respect to any price regulation (including but not limited to the issuance of orders establishing, specifying or revising maximum prices) with respect to any commodity sold prior to such repeal, revocation, amendment or other modification or exemption or suspension from price control of such commodity, whenever such action is deemed appropriate by the Administrator.

(*c*)—The term "price regulation" means a price schedule effective in accordance with section 206 of the Emergency Price Control Act of 1942, as amended, a maximum price regulation, temporary maximum price regulation, supplement or order, or any amendment or supplement thereto or order thereunder heretofore or hereafter issued."

* * * * *

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1946.

No. 890.

SMITH, RICHEY & CO., INC., *et al.*,
Petitioners,

AGAINST

PHILIP B. FLEMING, Temporary Controls Administrator,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

PETITIONERS' REPLY BRIEF.

JOSEPH COHN,
Attorney for Petitioners.

LOEB APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 890.

SMITH, RICHEY & CO., INC., *et al.*,
Petitioners,

AGAINST

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Emergency Court of Appeals.

PETITIONERS' REPLY BRIEF.

Respondent in his brief states the question presented in such a form as to avoid the real issue and makes certain statements of fact in a manner which is or may be misleading.

I.

Respondent Begs the Question.

Respondent states that the question presented is (Br. 2):

> "Whether the United States Emergency Court of Appeals erred in dismissing petitioners' complaint

> brought under Section 204 (a) of the Emergency Price Control Act, with leave to petitioners to move to reinstate the complaint in the event that any proceeding should be brought against them under Section 205 of the Act based upon any provisions of the orders and regulations objected to in the complaint, *when the regulations and orders were no longer in effect and there was no case or controversy as to their past validity existing between the parties to the proceeding.*" (Emphasis ours.)

The latter part of respondent's statement of the issue obviously begs the question. As thus phrased, the question assumes as a fact or settled law that as a result of the decontrol of meat the protested regulations are "no longer in effect" and that there is "no case or controversy between the parties hereto as to their past validity."

The first of these assumed "facts" is contrary to the decisions of this Court and to the Price Administrator's own orders cited in the petition and record[1] and the latter of these assumed "facts" is either likewise contradicted or has not as yet been and remains to be settled by this Court.

Moreover, both of these assumed "facts" are wholly refuted by the very judgment of the Emergency Court which respondent seeks to have sustained, for the very fact that the said court found it necessary to grant leave to petitioners to reinstate the complaint in the event of future enforcement proceedings against them and to retain jurisdiction for such purpose, even if only with respect to future enforcement proceedings under Section 205 of the Act (50 U. S. C. App., Sec. 925), unmistakeably shows an implied holding on the part of said court that

1. *U. S.* v. *Hark*, 320 U. S. 531; *Collins et al.* v. *Porter*, 328 U. S. 46; *Thomas Paper Stock Co.* v. *Porter*, 328 U. S. 50; *Utah Junk Co.* v. *Porter*, 328 U. S. 39; Supplementary Order 40, as amended, 11 F. R. 14,103; Supplementary Order 186, 11 F. R. 12,178 (R. 4, 31)

the protested regulations are "still in effect"; that the rights of petitioners need to be protected and must be preserved; that there is a "case or controversy between the parties to the proceeding" as to the past validity of said regulations; and that the court has jurisdiction of the cause and is empowered to retain same.

It is respectfully submitted, therefore, that the issue before this Court is not as stated in respondent's presentation of the question, but as stated by petitioners (Pet. 4-6) and whether the Emergency Court erred in the respects stated in the petition (Pet. 9-10).

II.

Correction of Respondent's Statements of Certain Facts.

Respondent's statements of certain facts under the headings "Statement" and "Argument" include allegations of fact which, as phrased, are not in accordance with the record or are incomplete and, in either case, are or may be misleading.

(a) *Statement concerning negotiations for disposition of protest proceedings.* Respondent states under the heading "Statement" (Br. 3):

> "During the month of May, 1946, counsel for the petitioners and the Administrator entered into informal *negotiations concerning the disposition of the protest proceedings,* but due to the temporary decontrol of meat during July and August, 1946, no further action was taken *by either party* to the proceedings (R. 19, 24)." (Emphasis ours.)

Although the foregoing statement has no bearing whatsoever on the issue before this Court, respondent apparently seeks to convey the impression, which he argued as a

fact and indication of admitted mootness in his motion to dismiss the complaint (R. 19-20), that petitioners were at some time in the past satisfied to have the protest disposed of otherwise than on the merits and that, during the period of temporary decontrol in July and August, 1946, completely abandoned even such interest in their protest.

These alleged and previously argued facts are wholly unsubstantiated by respondent's references to the record and are wholly untrue. On the contrary, it appears from the record that the "informal negotiations" mentioned by respondent had nothing to do with a disposition of the protest proceeding, but were merely a request by petitioners for interim relief on the basis of the evidence submitted and for permission to submit additional evidence and that the reason why petitioners did nothing in the matter during the temporary decontrol period of July and August, 1946, was that the Administrator promised to consider the said request but never granted the permission requested and never advised petitioners of the decision, if any, which he may have made in the matter and that, as soon as the Administrator without such advice to petitioners ordered the evidential record closed, petitioners filed a formal petition for permission to file the additional evidence (R. 24-25).

(b) *Statement concerning terminated criminal proceedings.* Respondent states under the heading "Argument" (Br. 5):

> "*It was alleged in the complaint that petitioners had an interest in a retroactive determination of the validity of the regulations involved because* of criminal proceedings pending against two of them for violations of the Administrative Code of the City of New York (R. 3). At the time the Administrator filed his motion to dismiss, however, these pro-

ceedings had been terminated (R. 21)." (Emphasis ours.)

The foregoing statement conveys the impression that the complaint in the Emergency Court was based solely upon the pendency of the said criminal proceedings against two of the forty petitioners for alleged violations of one of the three protested regulations; that no other interest on the part of the petitioners in a determination of the validity of the regulations was alleged in the complaint; and that the alleged interest of petitioners and the basis of the complaint came to an end when the said criminal proceedings were terminated.

This is wholly untrue and not in accordance with the record, for the complaint was filed by all forty and not only two of the petitioners and requested a determination of the validity of all three and not only one of the protested regulations and, while it made reference to the said criminal proceedings and the said criminal proceedings were terminated for reasons fully stated in the record (R. 31-32), it was not based solely or even in major part upon the said criminal proceedings, but upon the need of all petitioners to protect their rights in the event of future enforcement proceedings against them, especially criminal proceedings under state or local price control enforcement laws, and upon the same facts and the same grounds and the same provisions of law as mentioned in petitioners' answering brief in opposition to the motion to dismiss the complaint (R. 30-31) and in this petition (Pet. 6-8).

(c) *Statement concerning leave and retention of jurisdiction.* Respondent states under the heading of "Argument" (B. 5), in connection with petitioners' specification that the Emergency Court erred in limiting the leave granted to petitioners and the jurisdiction retained (Pet. 10):

> "The petitioners *made no request* of the court below that any such reservations be made in its judgment, covering liability under either Section 205, a reservation under which was included by the court, *or under the other provisions of law to which they NOW point.*" (Emphasis ours.)

The foregoing statement conveys the impression that petitioners did not raise in the Emergency Court the question of their liability under Section 37 of the Criminal Code (18 U. S. C. A., Sec. 88) or state or local price control enforcement laws and are *now* pointing to said provisions of law for the first time. This is wholly untrue for, as stated above and as appears from the record, the complaint as well as petitioners' answering brief in opposition to the motion to dismiss the complaint were based not only upon Section 205 of the Act but also upon Section 37 of the Criminal Code and especially upon the applicable state and local price control enforcement laws, as is the petition before this Court.

As for petitioners' failure to request "any such reservations", it is respectfully submitted that the "prayer" in the complaint was that the protested regulations be set aside; that under the said "prayer" the Emergency Court had the power to grant such relief short of an immediate determination as would adequately protect the rights of petitioners; and that, if the Emergency Court was correct in its obviously implied holding that petitioners' rights could be equally adequately protected by a preservation of their right to a determination as by an immediate determination, it was incumbent upon said court, to whom all facts were made available, to extend the protection granted to all future enforcement proceedings against petitioners, including future criminal proceedings under Section 37 of the Criminal Code or state or local price control enforcement laws.

III.

Petitioners' Legal Interest and Case.

Respondent argues that petitioners have no legal interest in a determination of the retrospective validity of the protested regulations and that the proceeding seeking such determination is not "a case or controversy" in the constitutional sense, for the alleged reason that no enforcement proceedings are now "actually pending against them" and that they failed to show "that they are in possession of any information" that such enforcement proceedings are about to be brought against them "or that they have any agreements the enforceability of which depends upon the invalidity of the regulations involved"; that the facts in the case at bar differ in such respect from the facts in the *Utah, Collins* and *Thomas* cases cited in the petition; that a determination of validity "*may* have no legal effect" upon petitioners; that their legal interest in such determination is "merely speculative"; that even such interest as petitioners now have will be lessened "daily as the statute of limitations effectively reduces even the possibility of such proceedings"; that a decision holding that the right of judicial review extends to cases such as the case at bar would place an undue burden upon the Emergency Court and "the public officials"; and that, in the absence of any express provision in the Act to such effect, it must be held that it was the intention of the Congress that the right of judicial review should not apply to cases such as the case at bar (Br. 4-8).

That the facts in the case at bar do, in some respects, differ from the facts in the *Utah, Collins* and *Thomas* cases was fully pointed out in petitioners' brief in support of the petition (Pet. 12).

It is respectfully submitted, however, as argued in said brief (Pet. 11-16) and in petitioners' answering brief in opposition to the motion to dismiss the complaint (R. 26-

36), that the clear language of the Act and the construction of the statute adopted and the principles declared by this Court in the case of *Yakus* v. *U. S.*, 321 U. S. 414, *U. S.* v. *Hark, supra,* and in the above mentioned cases which respondent seeks to distinguish are not limited to a state of facts of the kind existing in the latter cases, but apply in equal measure to the facts in the case at bar; that the rights of protest, determination and review granted by Sections 203 (a) and 204 (a) of the Act (50 U. S. C. App. Secs. 923 [a] and 924 [a]) are not conditioned upon an actual pendency or knowledge of actual impendency of enforcement proceedings or the existence of agreements the execution whereof would constitute a violation, but are unqualified and continue as long as the right to enforce and the need to protect the rights of persons "subject to" the regulations and the enforcement thereof (Pet. 12-14; R. 32-35); that the judgment of the Emergency Court, if left undisturbed, not only *may* but *will* actually seriously affect the right of petitioners in the event of any future enforcement proceedings against them, especially future criminal proceedings under state or local price control enforcement laws (Pet. 14-16; R. 36); that the statute of limitations as to criminal proceedings against petitioners will not expire for several years; that Sections 203 (a) and 204 (a) of the Act were enacted by Congress to protect the rights of persons "subject to" price regulations and the enforcement thereof and not for the convenience of "public officials"; and that petitioners' right to a determination of the validity of the protested regulations, or to at least a preservation of such right, cannot be denied as long as the right to institute enforcement proceedings against them continues.

As for petitioners' legal interest and the question of jurisdiction of the cause under Article III, Section 2 of the Constitution and the Declaratory Judgment Act, *45 Stat. 955, Judicial Code 274 (d), 28 U. S. C. 400,* it is respect-

fully submitted that petitioners duly pursued the remedy provided by Congress to protect their rights in the event of future enforcement proceedings against them for alleged violation of the regulations which they claim to be invalid; that their present legal interest in a determination of the validity of the protested regulations is precisely the legal interest contemplated by Congress in providing the remedy pursued; that the proceeding instituted by petitioners to enforce the remedy provided by Congress did not seek "an opinion advising what the law would be on a hypothetical state of facts", but a determination "of a conclusive character" which will seriously affect petitioners' right in the event of future enforcement proceedings against them; that no remedy other than the one pursued by petitioners is available to meet the demands of due process in the event of future criminal proceedings against them under state or local price control enforcement laws; that said proceeding is a "justiciable" and "real and substantial controversy admitting of specific relief" and "an adversary proceeding on facts alleged" wherein the "judicial function may be appropriately exercised"; and that said proceeding is "a case or controversy" within the meaning of Article III, Section 2 of the Constitution as well as "a case of actual controversy" within the meaning of the Declaratory Judgment Act, *Tutan* v. *U. S.*, 270 U. S. 568; *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227; 35 C. J. S. Fed. Courts, Sec. I.

IV.

The Cases Relied on By Respondent.

Respondent's contention that the case at bar is not "a case or controversy" in the constitutional sense is wholly unsupported by the cases cited in his brief.

In the case of *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113, the order of the Interstate Commerce Commission en-

joined by the District Court involved no question of possible prosecution for past violations and became wholly obsolete with the enactment of the Transportation Act of 1920, which was passed pending the appeal, and, unlike the determination sought in the case at bar, the order of injunction was no longer needed to protect complainants' rights.

In the case of *Willing* v. *Chicago Auditorium Association,* 277 U. S. 274, plaintiffs sought an interpretation of their rights under the leases by which they derived title in order to resolve their doubts as to the correctness of the interpretation favored by them and to make sure that the construction contemplated by them will not subject them to a possible action for damages by the lessor. The latter case is wholly unlike the case at bar in that, among other distinctions, it did not involve the question of validity of a regulation or other law entailing penalties, or a statutory duty to enforce same, or a preclusion of the defense of invalidity in prosecutions for violation thereof, or a need of protecting the right of persons "subject" thereto to due process of law, or a remedy especially provided by Congress to protect such right, or any facts even remotely similar to the facts in the case at bar.

As for the case of *Aetna Life Insurance Co.* v. *Haworth, supra,* in which this Court reversed the decree dismissing the complaint, and the case of *Montgomery Ward & Co.* v. *Bowles,* 147 F. 2d 858, in which the Emergency Court entertained the complaint and made a determination of the validity of the regulation involved, it is respectfully submitted that there is nothing in the principles declared in the said case to support respondent's contention but, on the contrary, that the said principles, even if allowing for the wholly different state of facts in the *Aetna* case and the existence of a preliminary injunction of doubtful remaining effect in the *Montgomery Ward* case, may be well said to fully support petitioners' contention that they

have a "legal interest" in a determination of the retrospective validity of the protested regulations and that the proceeding brought to secure such determination is "a case or controversy" within the meaning of Article III, Section 2 of the Constitution as well as "a case of actual controversy" within the meaning of the Declaratory Judgment Act.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Emergency Court of Appeals should be granted.

Respectfully submitted,

JOSEPH COHN,
Attorney for Petitioners.

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730906—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 890

SMITH, RICHEY & CO., INC., ET AL., PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

No opinion was rendered by the United States Emergency Court of Appeals.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on December 17, 1946 (R. 39). The petition for a writ of certiorari was filed on January 15, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act, as amended (50 U. S. C. App., Supp. V, 924 (d)),

making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether the United States Emergency Court of Appeals erred in dismissing petitioners' complaint brought under Section 204 (a) of the Emergency Price Control Act, with leave to petitioners to move to reinstate the complaint in the event that any proceeding should be brought against them under Section 205 of that Act based upon any provisions of the orders and regulations objected to in the complaint, when the regulations and orders were no longer in effect and there was no case or controversy as to their past validity existing between the parties to the proceeding.

STATUTE INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (herein sometimes termed the Act), are set out in the Appendix, *infra* pp. 9–16.

STATEMENT

This proceeding was instituted by protests filed with the Price Administrator in January, 1945, under Section 203 (a) of the Act by the petitioners, who are meat wholesalers in the New York City Area, against the provisions of Revised Maximum Price Regulations Nos. 148, 169, and 239 covering meats (R. 1).

By order of the Administrator dated February 19, 1945, the protests were consolidated and the petitioners were given an opportunity to present further evidence. Following this order, on application of the petitioners, the Administrator issued six orders extending the time during which petitioners might submit further evidence until February 15, 1946, and the additional evidence was filed on February 14, 1946. (R. 19.) During the month of May, 1946, counsel for the petitioners and the Administrator entered into informal negotiations concerning the disposition of the protest proceedings, but due to the temporary decontrol of meat during July and August, 1946, no further action was taken by either party to the proceedings (R. 19, 24). On September 18, 1946, the Administrator ordered the evidential record closed and referred the proceedings to a Board of Review. On October 14, 1946, a hearing was held by the Board of Review, but on October 15, 1946, meat was decontrolled and the Administrator entered an order dismissing the protests as moot. (R. 20.)

Petitioners filed their complaint in the Emergency Court of Appeals on November 13, 1946 (R. 1–18), and the Price Administrator filed a motion to dismiss the complaint on the ground that the proceeding had become moot (R. 18–19), and on December 17, 1946, the Emergency Court of Appeals entered judgment dismissing the com-

plaint, "with leave to the complaints to move to reinstate the complaint in the event that any proceeding should be brought against complainants under Section 205 of the Emergency Price Control Act of 1942, as amended, based upon any provisions of the orders and regulations objected to in the complaint, and jurisdiction of the cause is hereby retained for that purpose" (R. 39).

ARGUMENT

Petitioners contend that the Act entitles them to a judicial determination of the retroactive validity of regulations in which they no longer have any legal interest. This contention ignores the constitutional requirement that a case or controversy must exist between the parties litigant before a federal court created under Article III of the United States Constitution can be vested with jurisdiction to adjudicate their differences. In the case at bar, the regulations involved are no longer in force, and the petitioners concede that prospective relief could not be granted (Pet. 11). The petitioners endeavor to maintain, however, that they are entitled to relief from the retroactive effect of the regulations involved because the possibility that criminal proceedings may yet be instituted against them is not entirely foreclosed.[1] And they make this conten-

[1] The court below dismissed the complaint with leave to petitioners to reinstate it should proceedings be brought against them under Section 205 of the Act, based upon the

tion without showing that any such proceedings are actually pending against them;[2] that they are in possession of any information which reasonably leads them to believe that they will be charged with having violated the pertinent regulations during the time those regulations were currently in force and effect; or that they have any agreements the enforceability of which depends upon the invalidity of the regulations involved. The contention is patently unsound.

If the petitioners' argument that the mere possibility of enforcements proceedings against them entitles them to a determination of retroactive validity[3] were sound, every person who was at one

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regulations involved, and retained jurisdiction for that purpose. Petitioners contend that the court below erred in not including in the reservation criminal proceedings which may possibly be brought against them under Section 37 of the Criminal Code or under the New York state laws. The petitioners made no request to the court below that any such reservations be made in its judgment, covering liability under either Section 205, a reservation under which was included by the court, or under the other provisions of law to which they now point.

[2] It was alleged in the complaint that petitioners had an interest in a retroactive determination of the validity of the regulations involved because of criminal proceedings pending against two of them for violations of the Administrative Code of the City of New York (R. 3). At the time the Administrator filed his motion to dismiss, however, these proceedings had been terminated (R. 21).

[3] Since *Montgomery Ward & Co.* v. *Bowles*, 147 F. 2d 858 (E. C. A.), the Emergency Court of Appeals has ruled that the period in controversy in a proceeding for a declaratory judgment as to past validity of a regulation was necessarily

time subject to a regulation and who might now be interested in litigating the validity of the regulation for academic reasons, would have similar standing. Both the Administrator and the Emergency Court of Appeals might thus become engaged in litigation which could have no legal effect. It is submitted that such a proceeding is not a case or controversy within the meaning of Article III of the United States Constitution. The Emergency Court of Appeals has no jurisdiction to pass upon moot or abstract issues. Cf. *United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *Willing* v. *Chicago Auditorium Ass'n*, 277 U. S. 274.

There is nothing in the language of the Act or in its legislative history to indicate that the Congress intended that the Emergency Court of Appeals should be required to consider the validity of price regulations, either prospectively or retroactively, at the request of persons having no legal interest in them. In the absence of clear and unequivocal expression to that effect, it would be absurd to impute to the legislature an intention that every person who at one time was subject to a regulation, but who has merely a speculative legal interest therein after its abrogation, should

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only the period involved in the enforcement proceedings. Where, as here, therefore, no enforcement proceedings are pending, the period "in controversy" would necessarily be shortened daily as the statute of limitations effectively reduces even the possibility of such proceedings.

have the right to take up the time of the Emergency Court of Appeals and the public officials in carrying on litigation and obtaining judgments concerning the retroactive validity of the regulation, which may have no legal effect upon the parties litigant. Such a construction of the judicial review provision would hardly be compatible with Article III of the Constitution.

The regulations involved in the case at bar were no longer in force when the complaint was filed in the Emergency Court of Appeals, and the petitioners have failed to show that they have been charged with a violation of such regulations while they were in force, or that they have reasonable grounds for believing that they will be so charged in the future. Nor have they shown that they are parties to any other cases or controversies in connection with which a judgment on the validity of the regulations is essential.[4] Consequently, they have not stated or proved that they have a legal interest in the retro-

[4] The petitioners rely on the decisions of this Court in *Utah Junk Co.* v. *Porter*, 328 U. S. 39; *Collins* v. *Porter*, 328 U. S. 46; *Thomas Paper Stock Co.* v. *Porter*, 328 U. S. 50, holding that the Emergency Court of Appeals had jurisdiction to consider the validity of regulations after they had been superseded. In the *Utah Junk Co.* case, the petitioner, at the time of the proceeding, was involved in a controversy in which legal interests were involved, and in the *Collins* and *Thomas Paper Stock Co.* cases, the petitioners had been charged with continuing liability growing out of violations committed while the superseded provisions of the regulations were in force. The decisions in those cases are clearly not controlling here.

active effect of the regulations involved sufficient to invoke the jurisdiction of the Emergency Court of Appeals. The Declaratory Judgment Act (48 Stat. 955; Jud. Cod., § 274d; 28 U. S. C. 400) does not entitle the petitioners to relief in the case at bar, for that Act limits the proceedings which may be brought under it to controversies which are such in the constitutional sense. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227. Cf *Montgomery Ward & Co.* v. *Bowles, supra.* Hence, the court below committed no error, in dismissing the complaint in this case.

CONCLUSION

The judgment of the court below is correct, and there is no warrant for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

I. The pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in

support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effective-

ness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Su-

preme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price

schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in

accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judg-

ment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

SEC. 205. (c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the

violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however,* That all suits under subsection (e) of this section shall be brought in the district or county in which the defendant resides or has a place of business, an office, or an agent. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

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